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No. 96-1482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS MILBERG WEISS BERSHAD HYNES & LERACH, *ET AL.*

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the Ninth Circuit's holding that a district court conducting "pretrial proceedings" under the express grant of authority in 28 U.S.C. § 1407(b) is empowered to order a transfer for trial under 28 U.S.C. § 1404(a), where that holding is consistent with the decisions of all courts that have addressed the issue and with the plain language and legislative history of the applicable statutory provisions.

2. Whether certiorari should be granted to review the Ninth Circuit's holding that a transferee district court is empowered to transfer a case for trial, where petitioners never identified any error or prejudice resulting from the exercise of that power in this case, and where petitioners never asked the Judicial Panel on Multidistrict Litigation to remand the action to the transferor court, even though only the Panel is statutorily authorized to order that relief and petitioners are challenging the facial validity of one of the Panel's own Rules.

3. Whether certiorari should be granted to review the Ninth Circuit's affirmance of the dismissal of petitioners' Arizona law claims for malicious prosecution and abuse of process, where that decision does not conflict with any prior decision and involves at most a case-specific determination concerning petitioners' allegations that does not present any recurring or substantial question of federal law.

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BRIEF IN OPPOSITION FOR RESPONDENTS MILBERG WEISS BERSHAD HYNES & LERACH, *ET AL.*

Petitioners seek to keep alive their state law tort claims without raising any substantive challenge to the disposition of those claims on the merits. They do so by raising a procedural question that has provoked no disagreement in the lower courts—whether a case previously transferred for pretrial proceedings under the multidistrict litigation statute, 28 U.S.C. § 1407, can then be transferred for trial by the transferee judge under 28 U.S.C. § 1404. Petitioners offer little reason to believe that the Ninth Circuit's resolution of this issue may have been incorrect. In any event, this case is a poor vehicle for addressing the issue. First, petitioners have not properly preserved the issue. They never sought relief from the Judicial Panel on Multidistrict Litigation, even though the Panel was the sole

tribunal that could have awarded the relief petitioners sought and even though petitioners were challenging the validity of one of the Panel's own Rules. Second, petitioners have not alleged that they were prejudiced in any way by the locus of the trial. In the absence of a showing of prejudice, as this Court recently held in closely analogous circumstances, *see Caterpillar, Inc. v. Lewis,* 117 S. Ct. 467 (1996), there would be no basis for overturning the judgment entered below even assuming that the transferee court erred in retaining the case for trial. The petition should be denied.

STATEMENT OF THE CASE

At the core of this litigation are the materially misleading statements made by petitioners, first in assisting Charles Keating's efforts to defraud bank regulators and the investing public, and later in falsely portraying the settlement in the underlying litigation involving Lincoln Savings & Loan Association ("Lincoln" or "Lincoln Savings"). Petitioner Lexecon Inc. ("Lexecon") prepared false reports for Lincoln Savings to submit to federal and state regulators. In those submissions, despite having received regulators' reports showing extensive regulatory violations and criminal activity involving Lincoln Savings, Lexecon represented that "Lincoln is sound," is "safer than comparable thrifts," and is "safer than when acquired." That is why Lexecon was named as a defendant in *Lincoln Savings.* That also is why Lexecon failed to obtain dismissal of the claims against it, failed to obtain summary judgment after discovery, and failed to obtain a directed verdict after a four-month jury trial. Just as jury deliberations were about to commence, Lexecon settled the underlying litigation by paying the *Lincoln Savings* class more than $700,000 to avoid what would have been, in the words of the judge who presided at trial, a "possible catastrophic verdict." Then, Lexecon undertook a new campaign of deception: Lexecon filed this case against class counsel, alleging that

the class' claims against Lexecon were "baseless," that those claims were "terminated in Lexecon's and Fischel's favor," and that Lexecon "voluntarily" had decided to "benefit the Class" by paying it more than $700,000. Nearly all of Lexecon's claims were dismissed by the district court during pretrial proceedings, and the one remaining claim was rejected by the jury at trial.

1. The Parties.

As noted above, this action arises from federal class action litigation prosecuted in the District of Arizona after the collapse of Lincoln Savings. Petitioner Lexecon was a named defendant in *Lincoln Savings.* Petitioner Daniel R. Fischel was one of the principals of Lexecon. Respondents are the law firm of Milberg Weiss Bershad Hynes & Lerach, along with several of its present and former partners (collectively the "Milberg Defendants"), and the law firm of Cotchett, Illston & Pitre, along with its present and former partners (collectively the "Cotchett Defendants"), all of whom served as counsel for the *Lincoln Savings* class.

2. The *Lincoln Savings* Litigation And Lexecon's Role In That Litigation.

Lincoln Savings involved multiple lawsuits brought in various districts against Charles Keating, American Continental Corporation ("ACC"), its subsidiary Lincoln Savings, and approximately one hundred other defendants, including Lexecon. By the end of that litigation, class counsel (respondents here) had secured a $1.2 billion jury verdict and more than $240 million in settlements for their clients.

Shortly after the *Lincoln Savings* lawsuits were filed, the Judicial Panel on Multidistrict Litigation ("Panel" or "MDL Panel") transferred them under 28 U.S.C. § 1407 to the District of Arizona, to be supervised by the Hon. Richard M. Bilby. The class claims against Lexecon

arose from Lexecon's preparation, for submission by ACC/Lincoln to federal and state banking regulators, of false reports advocating the purported safety of Lincoln's operations and the value of Lincoln's assets. The class claimed that by issuing those false reports, Lexecon wrongfully assisted in propping up Lincoln Savings long enough for ACC/Lincoln to sell millions of dollars of worthless securities. *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1448 (D. Ariz. 1992).

After extensive discovery, Lexecon filed a motion for summary judgment, which Judge Bilby denied in a published opinion. *Id.* at 1448-49; Pet. App. 5a. The court observed that Lexecon's reports asserted that Lincoln Savings was both "sound" and "safe," even though Lexecon knew about Lincoln's prior wrongdoing, having received and reviewed a Federal Home Loan Bank Board examination report that catalogued Lincoln's "extensive regulatory violations." The court concluded that material issues of fact existed as to the "false or misleading" nature of Lexecon's representations. 794 F. Supp. at 1448-49.

The claims of the class against Lexecon and the other remaining defendants proceeded to trial in March 1992. Judge Bilby, sitting as an MDL transferee judge, transferred the litigation to his courtroom for trial without objection from Lexecon. After a four-month trial, Lexecon filed a motion for directed verdict. The court denied that motion, citing evidence that Lexecon had recklessly "shut [its] eyes" to palpable wrongdoing. CR113 Ex. B at 11948.[1]

3. Lexecon Settles The Claims Against It To Avoid A Jury Verdict.

On June 22, 1992, as jury deliberations were about to commence, Judge Bilby and counsel for Lexecon and the

[1] "CR" refers to the record below and "LSCR" refers to the record in *Lincoln Savings*.

class participated in an in-chambers settlement conference. Having recently lost its motion for directed verdict, Lexecon stated that it wished to avoid a jury verdict but did not want to be perceived as having "settled" for fear of the effect that might have on Lexecon's professional reputation. Pet. App. 5a. Attempting to accommodate Lexecon's purported concern, Judge Bilby and class counsel agreed to a settlement that was structured so as not to appear to be a standard settlement. Under that agreement, Lexecon ultimately paid over $700,000 to the class in exchange for being dismissed. Pet. App. 6a. After Lexecon settled, jury deliberations commenced as to the remaining defendants. The jury found all of them liable and assessed damages that totaled $3 billion. LSCR4044-47. Judge Bilby later remitted the award to a total of $1.2 billion. LSCR4325.

4. Lexecon Sues Class Counsel In Federal Court In Chicago And The *Lincoln Savings* Judge Holds That Lexecon's Principal Allegations Are "False."

On November 25, 1992, petitioners filed this diversity action in the Northern District of Illinois against the Milberg Defendants, the Cotchett Defendants, and other class counsel. Petitioners alleged state law claims for malicious prosecution, abuse of process, tortious interference, defamation, and commercial disparagement. CR1 ¶¶ 2-6; Pet. App. 6a. Petitioners charged that *Lincoln Savings* was "terminated in Lexecon's and Fischel's favor," that class counsel "implicitly acknowleg[ed] the lack of merit in their complaint" by agreeing to a settlement with Lexecon, and that Lexecon "voluntarily" decided to "benefit the Class" by "returning the professional fees paid to it by Lincoln and Keating." CR1 ¶¶ 63-64, 92.

On December 7, 1992, Judge Bilby, who was presiding over the still-pending *Lincoln Savings* litigation, convened a hearing by telephone with class counsel and Lexecon's

trial counsel.[2] Judge Bilby expressed grave concern over Lexecon's allegations, suggested that Lexecon may have perpetrated a "fraud on the Court," and directed the parties to file submissions explaining "why I shouldn't . . . set aside the dismissal of this case without prejudice and reinstate the plaintiffs' claim." CR18 Ex. E at 6. During a subsequent court session, Judge Bilby expressed vexation over Lexecon's characterization in its complaint of its payment to the class as "voluntary," stating "you have no right to come in and misrepresent to a judge in Chicago . . . what this, quote, settlement or resolution was, because . . . it wasn't any voluntary payment on your part. . . . I can put up with ornery lawyers, I can put up with contentious lawyers, but I can't put up with the kind of stuff that absolutely misrepresents what was done in my chambers by a group of lawyers." CR18 Ex. K at 44-45.

On December 31, 1992, Judge Bilby issued an order "to clarify the terms and conditions" of the dismissal of Lexecon. *See* Pet. App. 7a-8a n.2. That order outlined Lexecon's principal allegations in the suit against class counsel and held those allegations to be "false" (*id.*):

> The Court finds these paragraphs [Compl. ¶¶ 63, 64, and 92] to be a false description of the conditions under which Lexecon was dismissed from [the *Lincoln Savings*] case. . . . [I]t does not meet with reality and is factually incorrect.

Judge Bilby emphasized that Lexecon's payment to the class was not "voluntary," but was made so that Lexecon would not have to face a "catastrophic verdict" (*id.*):

> [A]t no time did this Court treat Lexecon's self-serving statements as representing "voluntary" con-

[2] Although trial had concluded, no final judgment had been entered because various settlements and other matters had not been completed. A final judgment order ultimately was entered in *Lincoln Savings* in March 1994. CR431 Ex. B.

> duct. Lexecon did not wish to submit its case to the jury and this Court's "resolution" was the bargained-for method of avoiding a possible catastrophic verdict.

In January 1993, petitioners appealed Judge Bilby's December 31, 1992 order to the Ninth Circuit. Recognizing the case-dispositive significance of that order, Lexecon described the order in its opening brief as "tantamount to a declaratory judgment in favor of Milberg Weiss as defendants in the Chicago lawsuit." Br. 19. The Ninth Circuit dismissed petitioners' appeal as premature because a final judgment in *Lincoln Savings* had not yet been entered. In March 1994, Judge Bilby entered final judgment (CR431 Ex. B), but petitioners failed to appeal from that judgment, and thereby abandoned their opportunity to challenge the findings made in the December 31, 1992 order.

5. Multidistrict Transfer And Proceedings In The District Of Arizona.

In February 1993, the MDL Panel issued a conditional order transferring petitioners' Chicago lawsuit to the District of Arizona, where Judge Bilby was to preside over the litigation along with the remainder of *Lincoln Savings*. As the Ninth Circuit observed in this case, Lexecon "was no stranger to the District of Arizona." Pet. App. 18a. Lexecon had performed professional services for Charles Keating in Arizona. In addition, Lexecon was retained as an expert to assist a defendant in the *Lincoln Savings* litigation pending in Arizona. Lexecon further defended against the claims that the *Lincoln Savings* class later made against Lexecon in Arizona, and consented to the permanent transfer of the *Lincoln Savings* case to Arizona for trial.

After the Panel issued its conditional transfer order, Judge Bilby recused himself because of his personal involvement in the settlement negotiations in *Lincoln Savings*. Pet. App. 61. Thus, in June 1993, in accordance with Section 1407(b)'s provision that MDL proceedings

may be conducted by more than one judge, the Panel issued a final transfer order transferring the lawsuit to the District of Arizona, to be supervised by the Hon. John M. Roll. Pet. App. 100a-02a. The propriety of that order never has been challenged by petitioners and cannot be challenged now. *See* 28 U.S.C. § 1407(e) ("[n]o proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code").[3]

In November 1993, Judge Roll, who formerly had been a judge of the Arizona Court of Appeals, issued an order dismissing petitioners' Arizona state law claims for malicious prosecution and abuse of process pursuant to Rule 12(b)(6). Pet. App. 80a-99a. In December 1993, the Milberg Defendants moved for summary judgment with regard to petitioners' remaining claims. CR177; CR181. Petitioners responded by filing a Rule 56(f) motion to defer resolution of the motion pending further discovery. Judge Roll granted Lexecon an opportunity to conduct discovery in order to respond to the summary judgment motion. CR 192.[4]

In August 1994, although discovery had not yet been completed and defendants' summary judgment motions remained pending, petitioners filed a motion requesting that Judge Roll suggest to the MDL Panel that it remand the case to Chicago. CR288. Judge Roll determined that

[3] Petitioners incorrectly contend that the Milberg Defendants filed a motion with the Panel "[a]fter six months of pretrial proceedings" had occurred in Chicago, during which the presiding judge supposedly made several rulings against defendants. Pet. 5. In fact, the Milberg Defendants filed a notice of related action with the Panel on February 9, 1993, *before* defendants filed any responsive pleading and *before* the Chicago judge made any ruling. CR12.

[4] Petitioners leave the impression that defendants did not move for summary judgment until after petitioners moved for a remand in August 1994. Pet. 7. In fact, defendants filed those motions more than seven months before petitioners requested a remand.

the question of remand was premature because discovery was ongoing, but ruled that petitioners could renew their request after discovery closed. CR311. After discovery closed, petitioners renewed their request. CR409. At no time did petitioners ever request relief from the Panel.

On April 24, 1995, Judge Roll entered summary judgment in favor of the Milberg Defendants on all of petitioners' claims, except for a defamation claim based on a letter to the editor of *The National Law Journal*. Pet. App. 64a-79a. Judge Roll also entered summary judgment in favor of the Cotchett Defendants on all of petitioners' claims. *Id.*

On May 5, 1995, Judge Roll transferred the case to the District of Arizona pursuant to Section 1404(a) for trial of the one remaining claim. Pet. App. 61a-62a. Petitioners responded by petitioning for a writ of mandamus, which the Ninth Circuit denied. Pet. App. 55a-60a. On July 25, 1995, trial commenced in Tucson on the defamation claim, and on August 1, 1995, the jury returned a unanimous verdict in favor of defendants. Pet. App. 53a-54a.

6. Appellate Proceedings In The Court Below.

On appeal, petitioners challenged the authority of the district court to transfer the case for trial. However, petitioners did not complain of any error in the court's conduct of the trial proceedings, did not identify any prejudice resulting from the fact that those proceedings took place in Tucson rather than in Chicago, and did not allege any jurisdictional or venue defects associated with proceeding in the District of Arizona. Petitioners' sole contention was that they were entitled to start this litigation over again in Chicago because, by virtue of the district court's allegedly erroneous refusal to suggest a remand to the MDL Panel and the related transfer order, petitioners were deprived of their initial choice of forum.[5]

[5] Petitioners also complained that the district court should have suggested a remand before adjudicating long-pending summary

Petitioners also challenged the district court's Rule 12(b)(6) dismissal of their malicious prosecution and abuse of process claims, contending that they had alleged the necessary elements of those claims under Arizona law, and that all the allegations had to be taken as true even though the *Lincoln Savings* trial judge had entered a final, unappealed order establishing a number of them to be false. Because the district court entered its Rule 12(b)(6) dismissal before petitioners requested a remand, however, petitioners did not challenge the court's authority to adjudicate that motion.

The Ninth Circuit affirmed. Pet. App. 1a-52a. With regard to the district court's transfer order, the Ninth Circuit concluded that the district court's authority to transfer the case for trial under Section 1404(a) is confirmed by the relevant statutory language and legislative history, the Rules promulgated by the MDL Panel, and unanimous judicial practice. Pet. App. 11a-18a.

With regard to the district court's Rule 12(b)(6) dismissal of petitioners' malicious prosecution and abuse of process claims, the Ninth Circuit emphasized that it reviewed that dismissal "de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon." Pet. App. 21a. The Ninth Circuit further emphasized that in assessing the sufficiency of petitioners' pleadings, it confined its review to those pleadings except insofar as it looked to court orders in *Lincoln Savings* that bore directly on petitioners' claims. Pet. App. 22a-23a. Applying those settled principles, the Ninth Circuit agreed with the district court that petitioners failed to state a claim for either malicious prosecution or abuse of process under Arizona law. Pet. App. 21a-28a.

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judgment motions, but similarly did not assign any legal or factual error in the actual adjudication of those motions. Petitioners have not challenged in this Court the propriety of the summary judgment proceedings.

REASONS FOR DENYING THE WRIT

The petition should be denied because the primary question presented has been answered consistently by the lower federal courts for many years, has seldom been the subject of dispute by litigants, and could not affect the result here in any event.

1. The Ninth Circuit's trial transfer determination does not conflict with the decision of any court. No court ever has denied the authority of a transferee district court, while conducting "pretrial proceedings" under Section 1407, to adjudicate Section 1404(a) transfer motions, as expressly authorized by the MDL Panel's own Rules. The reason is that the practice comports with the plain language of Sections 1407 and 1404(a) and with the applicable legislative history.

2. Even if the transfer question warranted review in the abstract, this case would not be an appropriate vehicle because a ruling on the question could not affect the outcome. Although petitioners argue that the district court abused its discretion in refusing to suggest a remand and in proceeding instead to preside at trial, they have never disputed that the district court had jurisdiction and venue to conduct those proceedings. Nor have petitioners ever assigned any error in the actual conduct of trial or alleged any prejudice resulting from those proceedings, other than to contend that petitioners' initial choice of forum was frustrated. Those omissions are dispositive because "[o]n the hearing of any appeal or writ of certiorari in any case, the court [is required to] give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. As this Court unanimously held earlier this Term in rejecting a similar attack on a judgment rendered by a federal court of competent jurisdiction, solely on the basis of an erroneous refusal to remand, the result petitioners seek here is "incompatible with the fair and unprotracted administration of justice." *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467, 477 (1996).

In addition, the Ninth Circuit's holding concerning transfer warrants no further review because petitioners never sought a remand from the MDL Panel, which is the only tribunal empowered to order the relief petitioners desired. Petitioners have waived any right to complain that they never received the relief that only the MDL Panel could grant. Indeed, given that petitioners' contentions directly attack the facial validity of one of the Rules of Procedure promulgated by the Panel, and that petitioners have deprived the Panel of any opportunity to pass on that attack in the first instance, it would be especially inappropriate to grant review.

3. The dismissal of petitioners' malicious prosecution and abuse of process claims likewise does not warrant review. In affirming that dismissal, the Ninth Circuit applied wholly uncontroversial rules for assessing the sufficiency of pleadings. That ruling does not conflict with the decision of any court, and at most involves a case-specific determination that presents no substantial or recurring issue of federal law.

I. THE PRIMARY QUESTION PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT.

A. The Ninth Circuit's Decision Does Not Conflict With The Decision Of Any Court.

The Ninth Circuit's affirmance of the district court's trial transfer order warrants no review because, as petitioners themselves concede (Pet. 20), that decision does not conflict with the decision of any court. To the contrary, every court that has confronted the issue—including eight different courts of appeals—either has approved or recognized without criticism the power of transferee district courts to order changes of venue for trial to their own districts under Section 1404(a). *E.g.*, *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1178 (D.C. Cir. 1987) (D. H. Ginsburg & Williams, JJ., concurring in panel opinion), *aff'd on other grounds sub nom. Chan*

v. Korean Air Lines, 490 U.S. 122 (1989); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 820 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *In re Food Lion, Inc. Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 532 (4th Cir. 1996); *In re Bendectin Litig.*, 857 F.2d 290, 295 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Washington Pub. Utils. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir. 1987); *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1061 (10th Cir. 1992).[6]

So established is the power that it long has been memorialized in the MDL Panel's own Rules and in the

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[6] *See also In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (Easterbrook, J., sitting by designation); *In re Air Crash Disaster at Detroit Metropolitan Airport*, 737 F. Supp. 391, 393 (E.D. Mich. 1989); *In re Tax Refund Litig.*, 723 F. Supp. 922, 924 (E.D.N.Y. 1989); *In re Longhorn Sec. Litig.*, 573 F. Supp. 274, 276 (W.D. Okla. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 86 F.R.D. 431, 432 (D. Mass. 1980); *In re Air Crash Disaster Near Chicago, Illinois*, 476 F. Supp. 445, 450 (J.P.M.L. 1979); *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403-04 (J.P.M.L. 1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.L. 1976); *Alaska Airlines v. United States*, 399 F. Supp. 906, 912 (N.D. Cal. 1975); *In re Molinaro/Catanzaro Patent Litig.*, 402 F. Supp. 1404, 1405-06 (J.P.M.L. 1975); *In re Bomb Disaster at Roseville, Calif.*, 339 F. Supp. 1400, 1405-06 (J.P.M.L. 1975); *In re Nat'l Student Mktg. Litig.*, 358 F. Supp. 1303, 1304 (J.P.M.L. 1973); *In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 577 (S.D.N.Y. 1973); *In re Air Crash Disaster at Toronto Int'l Airport*, 346 F. Supp. 533, 534 (J.P.M.L. 1972); *In re Air Crash Disaster at Huntington, W. Va.*, 342 F. Supp. 1400, 1403 n.4 (J.P.M.L. 1973); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972); *In re Air Crash Disaster Near Hanover, N.H.*, 342 F. Supp. 907, 909 (D.N.H. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971); *In re Grain Shipments*, 300 F. Supp. 1402, 1404 (J.P.M.L. 1969).

Manual for Complex Litigation. MDL Rule 14(b) provides:

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or . . . § 1406.

The *Manual for Complex Litigation* concurs:

> [T]he [MDL] transferee judge may transfer cases for trial to any district, including the § 1407 transferee district, permitted by 28 U.S.C. § 1404. . . . This procedure may enable the transferee judge to transfer some or all of the cases to the judge's own court for trial.

Manual for Complex Litigation, Third § 31.132 at 254 & n.807 (1995); *accord* Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 479 (1989); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation*, 78 F.R.D. 575, 581 n.42 (1977).[7]

The absence of a conflict on the question is by itself a strong reason to conclude that petitioners have failed

[7] Although acknowledging the lower courts' unanimous approval of the transfer practice at issue, petitioners and the dissenting judge below insist that "not a single commentator" has found statutory support for that practice. Pet. 15. In fact, commentators repeatedly have done so. Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 751-52 (1995); see Gregory R. Harris, Note, *Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a)*, 22 Hastings L.J. 1289, 1325-26 (1971); Comment, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1017-23, 1030-32 (1974). Many additional commentators have recognized the practice without criticism. *E.g.*, William W. Schwarzer, et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529, 1534 (1995); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 885.

to identify a substantial question warranting review by this Court.

B. The Ninth Circuit's Decision Is Correct.

The transfer issue also warrants no further review because the prevailing rule followed by the Ninth Circuit is fully consistent with the plain language of Sections 1407 and 1404(a) and with the relevant legislative history. Petitioners contend that there is an irreconcilable conflict between those two statutes so that, in cases governed by Section 1407, Section 1404 cannot apply. But that conflict is illusory. Taken together, those provisions establish that "Congress contemplated that transferred cases might never return to the transferor courts, but instead might be . . . transferred under Section 1404(a) to that same transferee court." *Korean Air Lines*, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ., concurring).

1. The Plain Terms Of Sections 1407 And 1404(a) Support The Decision Below.

The trial transfer order affirmed by the Ninth Circuit finds ample support in the plain terms of Section 1407, as well as in the equally plain terms of Section 1404(a).

Section 1407. The trial transfer order at issue was expressly authorized by Section 1407(b), which empowers the MDL transferee judge to conduct "pretrial proceedings." 28 U.S.C. § 1407(b). The term "pretrial proceedings" plainly includes rulings not only on *dispositive* motions but also on motions for transfer under Section 1404(a). *See In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972) ("[a] transferee judge under Section 1407 has the responsibility for all pretrial proceedings in litigation assigned to him and the [Section 1404(a)] motion before [the transferee court] is certainly a 'pretrial' motion"); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (Easterbrook, J., sitting by

designation) ("[o]ne of the pretrial questions within my province is whether to accept the magistrate's report and transfer the action to Illinois (that is, to me) under § 1404 . . . . Mahurkar's [Section 1404] motion is granted"); *Greyhound Computer Corp. v. IBM Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972) (same); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299, 303 (S.D.N.Y.) (same), *mandamus denied sub nom. Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971) (same). Indeed, petitioners' *amicus*, Professor Charles Alan Wright, has confirmed in his treatise that a motion to transfer under Section 1404(a) is a "pretrial motion" that "falls naturally within the transferee judge's statutory power to control all pretrial proceedings." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3866 at 620 (2d ed. 1986) (further confirming that "there are strong reasons supporting the practice of using Section 1404(a) to enable a Section 1407 transferee judge to retain and determine the merits of the coordinated cases").

Petitioners and their *amicus* nowhere address Section 1407(b) or the transferee judge's statutory power to conduct "pretrial proceedings." Instead, they rest their argument on a single clause in Subparagraph (a) that addresses the duties of the *Panel*—the clause providing that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings . . . unless it shall have been previously terminated." 28 U.S.C. § 1407(a); *see* Pet. 12; Brief of *Amicus* Charles Alan Wright at 3.

As the Ninth Circuit correctly observed, however, that argument attributes unintended significance to Section 1407(a). The "shall be remanded" clause of Section 1407(a) was concerned with "creating and defining the functions of the JPML, not [with] redefining or circumscribing the traditional powers of the district court to

which a case has been transferred." Pet. App. 15a. Neither that clause, nor any other provision anywhere in Section 1407, purports to prohibit the transferee judge from considering a Section 1404(a) motion in the course of conducting "pretrial proceedings."

Section 1404(a). The transferee court's authority to order trial transfers is further confirmed by the plain language of Section 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Nothing in that categorical language even suggests that the transfer power conferred therein cannot be exercised by MDL transferee judges. To the contrary, as this Court has held, "[t]he reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded." *Ex parte Collett*, 337 U.S. 55, 58 (1949).

Petitioners nonetheless suggest that the transfer order at issue did not comply with Section 1404(a) because "that provision only authorizes a district court to transfer a case to 'any *other* district.'" Pet. 12 (emphasis in original). That suggestion ignores the most natural reading of the statutory phrase "other district"—*i.e.*, as a district "other" than the district in which the action was filed. Under that straightforward reading, the trial transfer at issue here *was* to an "other" district. Absent that transfer order, the trial would have occurred in Illinois. Thus, in accordance with this Court's "common-sense approach . . . in interpreting § 1404(a)," *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 24-27 (1960), there is every reason to read the statute as authorizing precisely what occurred here—a transfer for trial from Illinois to Arizona.

This reading also avoids an odd consequence of petitioners' proposed interpretation. Under petitioners' "other" district theory, Judge Roll as MDL transferee judge could

have transferred this case for trial to any other district, but not to the District of Arizona. That would make no sense. It is therefore no wonder, as the dissent below observed (Pet. App. 43a), that no federal court of appeals ever has addressed, let alone credited, petitioners' "other" district theory.

Petitioners and their supporting *amicus* also suggest that ordering Section 1404(a) transfers for trial is inconsistent in some way with Congress' 1968 decision to confine Section 1407 to pretrial proceedings, and with Congress' subsequent determination to extend Section 1407 to cover trial only in a limited class of proceedings. *See* Pet. 12-13; Brief of *Amicus* Charles Alan Wright at 4-6. In attempting to attribute dispositive significance to those actions by Congress, petitioners and *amicus* conveniently ignore an important feature unique to Section 1407: it authorizes transfers *regardless* of whether the transferee district is one in which the action could have been brought originally. In contrast, Section 1404(a) trial transfers can be made *only* to districts or divisions where the action "might have been brought." 28 U.S.C. § 1404(a). Given the significant differences in the two statutes, it hardly follows that by declining to authorize Section 1407 transfers for trial in all civil actions, Congress intended to bar MDL judges from ordering Section 1404(a) transfers in appropriate circumstances.

2. The Legislative History Of Section 1407 Supports The Decision Below.

The Ninth Circuit's decision finds further support in the legislative history of Section 1407, which reveals that the MDL statute was intended to *expand* the judiciary's transfer powers, not to preclude or abridge the use of Section 1404. The House Report states that the term "pretrial proceedings" in Section 1407(b) broadly encompasses "the practice and procedure which precede trial of an action" (*see* H. Rep. No. 90-1130, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900), and stresses that Section 1407

does not prevent transfers under Section 1404(a) (*id.* (emphasis added)):

> [T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings. The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case *or exclude the possibility of transfer under other Federal statutes.*

Indeed, in discussing the "shall be remanded" clause in Subparagraph (a), the House Report again suggests the possibility of Section 1404(a) transfers (*id.* at 1901-02 (emphasis added)):

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and the Committee consequently considers it desirable to keep this legislative proposal within the confines of that experience. Additionally, trial in the originating district is generally preferable. . . . *Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.*

Accord S. Rep. No. 90-454 at 5 (1967) ("28 U.S.C. 1404 . . . is available for those instances where transfer of a case for all purposes is desirable").

In sum, the trial transfer power unanimously approved by the courts over the past thirty years is amply supported by the applicable statutory language and legislative history. Although petitioners ask the Court to assume an irreconcilable conflict between Sections 1404(a) and 1407, petitioners' mode of statutory construction is contrary to the usual rule that statutes should be read to avoid such a conflict and to give effect to both statutes.

See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2327 (1995). That is easily done here: as the Ninth Circuit held, Section 1404(a) and Section 1407 are complementary, not conflicting, statutory tools for resolving complex litigation justly, efficiently, and consistently.

C. Review Of The Transfer Question Would Be Premature.

Review of the Ninth Circuit's ruling on the transfer issue also would be unwarranted because it would be premature. Prior to this case, according to Judge Kozinski's dissent, the only court of appeals decision that had "seriously addresse[d]" the transfer practice at issue was the Second Circuit's 1971 decision in *Pfizer v. Lord*. Pet. App. 34a (Kozinski, J., dissenting). In addition, again according to Judge Kozinski, at least some of the arguments raised by petitioners had never before been considered by any court of appeals. *Id.* at 43a.

Thus, if this Court were to conclude that the dissent has cast a new light on the transfer practice challenged here, the Court would benefit from further consideration of the matter by the lower federal courts. Because other litigants are likely to raise Judge Kozinski's arguments in other cases, there is no reason to rush to review the first case in which those arguments made an appearance.

II. THIS CASE WOULD PROVIDE AN INAPPROPRIATE VEHICLE FOR REVIEWING THE TRANSFER ISSUE.

Even if the primary question otherwise warranted review, which it does not, this would be the wrong case for such review because no resolution of the transfer question by this Court could alter the result reached here. That is so for two reasons: (1) under 28 U.S.C. § 2111, this Court's recent decision in *Caterpillar*, and numerous other authorities, the proceedings following the allegedly erroneous refusal to remand would have to be sustained because the district court had jurisdiction and venue to preside over those proceedings and petitioners have failed to assign any error or allege any prejudice in the conduct of those proceedings; and (2) petitioners waived their arguments by failing to request a remand from the MDL Panel.

A. There Was No Error Or Prejudice In The Proceedings Following The Transfer For Trial.

Petitioners have never contended that the district court lacked jurisdiction or venue to conduct the trial. Nor have they complained of any error in the conduct of those proceedings; the only ruling that petitioners have ever challenged as substantively erroneous is the Rule 12(b)(6) dismissal of their malicious prosecution and abuse of process claims, but that ruling was a *pre*-trial disposition, and was made months *before* petitioners even requested a remand to Chicago. Finally, petitioners never have contended that they experienced any actual prejudice because proceedings took place in Tucson rather than in Chicago. On these facts, no further review is warranted because any error in the decision below would be harmless. *See* 28 U.S.C. § 2111 ("[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").[8]

[8] Petitioners' contention that they were deprived of their choice of forum by itself warrants no relief because the choice of venue is only a privilege that will give way, as Sections 1404(a) and 1407 establish, in appropriate circumstances. *See Burlington Northern R.R. v. Ford*, 504 U.S. 648, 651 (1992) ("[v]enue rules generally reflect [only] equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial"). Indeed, this Court has held that new statutes concerning venue and transfer—statutes that clearly can have a direct impact on plaintiffs' choice of forum—may be applied retroactively to cases pending at the time of the statute's enactments because such statutes are "wholly procedural"

To our knowledge, no court ever has reversed a judgment on the merits based on an erroneous transfer where, as here, (1) trial proceedings took place in a district where the action could have been brought originally, and (2) no showing of material error or prejudice was made. After all, permitting such reversals would give a losing litigant a second bite at the apple, without any reason to believe that justice was not done in the first trial. *See Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950) ("[u]pon an appeal from a final judgment against it, it will be difficult for the plaintiff to show that it lost the case because of the handicap of the transfer"); *In re Josephson*, 218 F.2d 174, 180 (1st Cir. 1954) ("it is difficult to see" how a reviewing court could vacate a judgment, entered after an allegedly erroneous transfer, where the judgment was rendered in a district in which the action could have been brought); *Filmline (Cross-Country) Prod. v. United Artists Corp.*, 865 F.2d 513, 520 (2d Cir. 1989) ("[s]hould [the movant] finally lose on the merits below, any error in the interlocutory order" denying a change of venue probably would not constitute reversible error because the movant "could hardly show that a different result would have been reached had the suit been transferred" (internal citations omitted)); *In re Dalton*, 733 F.2d 710, 717 (10th Cir. 1984) (recognizing "difficult burden of demonstrating prejudice" stemming from allegedly erroneous transfer after entry of final judgment); 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3855 at 472-74 (2d ed. 1986) ("[t]he [Section 1404(a)] order can be reviewed on appeal from a final judgment in the action, although it is very unlikely to constitute reversible error at that stage of the case").

Indeed, this Court recently confirmed that when a plaintiff receives an adjudication free of error and prejudice

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provisions. *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 563 (1967); *Ex parte Collett*, 337 U.S. at 71.

in a federal court with jurisdiction and venue—as petitioners did here—considerations of finality, efficiency, and economy override any error in a prior refusal to order a remand to plaintiff's chosen forum. In *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), a defendant improperly removed a state court case to federal court purportedly on the basis of a diversity of citizenship. A remand was erroneously denied. But because certain parties were later dropped, diversity did exist at the time of trial and judgment.

On appeal, plaintiff argued that he was entitled to another trial because he had been erroneously denied his right to choose the forum. The Court held that his interests were overshadowed by "considerations of finality, efficiency, and economy" (*id.* at 476-77):

> These arguments are hardly meritless, but they run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie* . . . , considerations of finality, efficiency, and economy become overwhelming. . . . To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.[9]

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[9] The "considerations of finality, efficiency, and economy" that resulted in this Court's decision in *Caterpillar* are of particular significance in Section 1407 cases. Judicial efficiency and finality were primary factors motivating its enactment and Congress' interest in those salutary goals is evident throughout the statute. *See, e.g.*, 28 U.S.C. § 1407(e) (restricting appellate review of Panel transfer decisions only to mandamus review and thereby ensuring that transfer decisions would not be subject to review at end of case). Petitioners' challenges to the final judgment in this case undermine the interests of efficiency and finality that lie at the core of Section 1407.

Those same considerations would dictate the same result here. Like the plaintiff in *Caterpillar*, petitioners' only complaint is that their initial choice of forum was frustrated. As in *Caterpillar*, any error in that ruling would be overcome by "considerations of finality, efficiency, and economy" that arise from the final judgment in this case, which was entered after full discovery and a jury trial. Indeed, that conclusion applies with even greater force in this case because the federalism concerns that inherently accompanied the divestiture of state court jurisdiction in *Caterpillar* are not present here. In addition, unlike in *Caterpillar*, jurisdiction and venue in the District of Arizona existed all along, and petitioners have not suggested any differences—procedural or otherwise—in the way the lawsuit would have proceeded had it been litigated in the Northern District of Illinois rather than in the District of Arizona. Because "[n]othing but a waste of time and resources would be engendered by remanding to the District Court or by forcing the[] parties to begin anew," no further review is warranted. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 838 (1989).

B. Petitioners Waived Their Challenge By Failing To Ask The Multidistrict Panel For A Remand.

Petitioners' challenge to the ruling below also is unavailing because they never asked the MDL Panel to remand the case to Chicago, even after the district court refused to suggest a remand. Section 1407 provides that remands to transferor courts are to be made only "by the Panel" and are reviewable only by a petition for a writ of mandamus. *See* 28 U.S.C. §§ 1407(a), (e). The MDL Rules state that the Panel shall consider whether to remand a transferred action on: (1) motion of any party; (2) suggestion of the transferee court; or (3) the Panel's own initiative. MDL Rule 14(c). Although Rule 14(d) states that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court,"

Rule 14(c) provides that the Panel can order a remand without such a suggestion on motion or *sua sponte*.

Petitioners, however, presented their remand request *only* to the district court. They never sought relief from the MDL Panel, even though the Panel alone could order the relief petitioners were seeking, and even though petitioners' arguments assailed the facial validity of one of the Panel's Rules. *See* MDL Rule 14(b). That failure should foreclose petitioners from bringing their arguments here. Congress has seen fit to vest in the Panel—made up of seven experienced federal judges appointed by the Chief Justice of the United States—exclusive authority to order Section 1407 transfers and remands and to promulgate MDL Rules of Procedure. Petitioners' end-run around the Panel not only threatened to subvert the Panel's authority and the rules concerning appellate review of Panel decisions, but also prevented the Panel from addressing petitioners' attack on one of its Rules and thus deprived this Court of the benefit of the Panel's experience and judgment.

Petitioners defend their failure to take their remand request to the Panel by contending that they were prevented from doing so because: (1) the "proper practice" was to request relief from the district court in the first instance; and (2) once the district court denied petitioners' motion for remand and simultaneously ordered a transfer for trial, it was too late to go to the Panel. Pet. 18 n.8. But nothing in the MDL Rules barred petitioners from going directly to the Panel for relief during the months after they had sought a remand from the district court—or even *after* the district court had entered a transfer order that, according to petitioners, was barred by Section 1407.[10]

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[10] Certainly, petitioners were far from reticent when it came to devising and using aggressive tactics to stop the transferee judge from presiding over the litigation. For example, after Judge Roll initially decided to hold petitioners' remand request in abeyance

In sum, petitioners' failure to request a remand from the only tribunal with authority to grant a remand is another reason why no further review of this case is warranted.

III. THE RULE 12(b)(6) DISMISSAL ORDER WARRANTS NO FURTHER REVIEW.

Petitioners also seek review of the Rule 12(b)(6) dismissal of petitioners' state law malicious prosecution and abuse of process claims, not because petitioners question the district court's authority to order that dismissal, but because in affirming that dismissal the Ninth Circuit supposedly engaged in improper fact finding beyond the four corners of petitioners' complaint. Review of that question would be wholly unwarranted because the Ninth Circuit's ruling follows the usual rules for adjudicating Rule 12(b)(6) motions, does not conflict with the decision of any court, and thus at most presents a case-specific issue concerning the resolution of a routine motion.[11]

First, the Ninth Circuit's affirmance of the dismissal of petitioners' state law malicious prosecution claim warrants

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until the close of discovery, petitioners promptly moved for reconsideration. CR328. When that motion failed, petitioners upped the ante by asking Judge Roll to recuse himself. CR343. Petitioners then attempted to fortify their pending motion for recusal by subpoenaing Judge Bilby, demanding his testimony and production of his bench files, and thereby necessitating a motion to quash filed by the United States Attorney for the District of Arizona. CR386, CR394.

[11] Without citation of authority, petitioners contend that their second question presented need not be considered should the Court grant certiorari and reverse on the transfer issue, because that result somehow would render the district court's and the Ninth Circuit's Rule 12(b)(6) decisions a nullity. Pet. 27 n.9. Particularly in light of this Court's recent *Caterpillar* decision, however, that contention is specious. Indeed, the justification for rejecting that contention under *Caterpillar* is particularly strong given that petitioners never have disputed the MDL transferee judge's authority to adjudicate defendants' Rule 12(b)(6) motions and do not do so here.

no further review because that decision is in accordance with accepted standards for adjudicating Rule 12(b)(6) motions. Although petitioners contend that the Ninth Circuit ignored the principle that "a court must accept the truth of all allegations in the plaintiff's complaint" (Pet. 22), the decision below belies that charge (Pet. App. 21a):

> We now turn to Lexecon's appeal from the dismissal by the district court under Fed. R. Civ. P. 12(b)(6) of its malicious prosecution and abuse of process claims. Our review of this dismissal is de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon.

Similarly, it was hardly controversial for the court to have relied on final orders issued by another federal court in a related case. *See* Pet. 22a-23a (citing cases); *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) (in considering Rule 12(b)(6) motion, "we are not precluded . . . from taking notice of items in the public record," including "historical facts" that form the basis for the claims for relief); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 at 299 (2d ed. 1990) ("matters of public record, orders, items appearing in the record in the case, and exhibits attached to the complaint" may be considered in adjudicating a Rule 12(b)(6) motion).

Petitioners suggest that "[i]n the court's view, it is perfectly appropriate for a court to use any material in the 'public record'—which could include, for example, newspaper articles, investigative reports, and all sorts of public filings by private parties—as a basis for rejecting, at the motion to dismiss stage, the factual assertions in a plaintiff's complaint." Pet. 22 (citing Pet. App. 23a). In fact, the Ninth Circuit neither did nor said anything resembling petitioners' account. Instead, on the basis of "ample authority" authorizing judicial notice of "court records in related or underlying cases" in connection with Rule

12(b)(6) motions, the Ninth Circuit looked only to Judge Bilby's published summary judgment opinion and his December 31, 1992 order in determining that petitioners had failed to state a claim. Pet. App. 22a-23a. As the Ninth Circuit observed, that approach was not only authorized by law, but dictated by common sense. *Id.* at 23a. That is particularly true given that petitioners themselves referred to the summary judgment proceedings and the December 31, 1992 order in their amended complaint. CR127 ¶¶ 68-70, 108-11.

Second, the Ninth Circuit's affirmance of the dismissal of petitioners' abuse of process claim likewise comports with well-established principles of law. Although petitioners take a passage from the decision below out of context and use it to accuse the Ninth Circuit of engaging in improper fact finding concerning motive (Pet. 24), the section immediately following the passage cited by petitioners reveals that the court did no such thing. Instead, the Ninth Circuit set forth the complaint's allegations in light of the substantive elements of an abuse of process claim under Arizona law, and concluded that even if all those allegations were accepted as true, they did not state a claim for relief under Arizona law because the complained-of conduct either occurred before process issued or constituted a lawful and proper use of process. Pet. App. 27a-28a. That case-specific application of Arizona law to the allegations in petitioners' complaint is correct, does not conflict with the decision of any court, and does not warrant review in this Court.

In light of the substantial evidence of Lexecon's fraud in *Lincoln Savings* that Judge Bilby cited in denying Lexecon's motions for summary judgment and directed verdict, and in light of Judge Bilby's unappealed ruling that the allegations lying at the heart of the dismissed claims in this case were "false," it was neither erroneous nor improper for the courts below to refuse Lexecon's invitation to turn a blind eye to those prior orders. Consistent with the obligations of good faith and Fed. R. Civ. P. 11, Lexecon's claims for malicious prosecution and abuse of process never should have been alleged at all. They certainly warrant no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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